No. 89-1299

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DON G. BLACKWELL,
Petitioner,

vs.

THE CITY OF ST. LOUIS,
and WILLIAM C. DUFFE,
Respondents.

On Petition for Writ of Certiorari to the
Missouri Court of Appeals, Eastern District

RESPONDENTS' BRIEF IN OPPOSITION

JAMES J. WILSON
City Counselor
JULIAN L. BUSH*
KATHLEEN A. GORMLEY
Associate City Counselors
Room 314, City Hall
St. Louis, MO 63103
(314) 622-3361
Attorneys for Respondent

*Counsel of Record

St. Louis Law Printing Co., Inc., 13307 Manchester Road 63131 314-231-4477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 89-1299

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DON G. BLACKWELL,
Petitioner,

vs.

THE CITY OF ST. LOUIS,
and WILLIAM C. DUFFE,
Respondents.

On Petition for Writ of Certiorari to the
Missouri Court of Appeals, Eastern District

RESPONDENTS' BRIEF IN OPPOSITION

Respondents The City of St. Louis and William C. Duffe respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion of the Missouri Court of Appeals, Eastern District, in this case. That opinion is reported as *Blackwell v. City of St. Louis,* 778 S.W.2d 711 (Mo. App. 1989).

STATEMENT OF THE CASE

Respondents incorporate by reference the statement of facts in the opinion below (Pet. App. A-2 - A-4), which is fair and evenhanded.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner presents five reasons why he believes that this Court ought to grant review: 1) that the decision below determined a federal question in a way that conflicts with applicable decisions of this Court; 2) that the decision below determined a federal question in a way that conflicts with decisions of federal courts of appeal; 3) that the decisions below determined a federal question in a way that conflicts with the decisions of other state courts of last resort; 4) that there is a need for additional guidance from this Court; and 5) that the court below engaged in a novel and unprecedented approach. There is, however, no special and important reason to grant review.

1. The Court Below Did Not Decide The Federal Question In A Way That Is In Conflict With Applicable Decisions Of This Court.

Petitioner argues that the decision below is in conflict with this Court's decisions in *Jett v. Dallas Independent School District,* 491 U.S. ____, 105 L.Ed.2d 598, 109 S.Ct. ____ (1989); *City of St. Louis v. Praprotnik,* 485 U.S. ____, 99 L.Ed.2d 107, 108 S.Ct. ____ (1988); *Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986); and *Owen v. City of Independence,* 445 U.S. 622 (1980). It is not.

Petitioner asserts that these cases establish that a city is liable for the acts of its final policymakers; petitioner asserts that The City of St. Louis's final policymaker is the civil service commission; therefore, petitioner concludes, The City of St. Louis is liable, under these precedents, for the act of the civil service commission.

Petitioner's conclusion is false because he reads the Court's decisions too broadly; the Court has not held that a city is liable for all of the acts of its final policymakers, even in the area of city business where the final policymakers have the authority to make city policy. A policy is still required, and an act, even by a

policymaker, is not liability engendering, unless the act is taken pursuant to a policy.

The Court's holdings on the issue are most clearly set forth in *Praprotnik*. Justice Brennan argued, like petitioner here, that the policy inquiry is superfluous: all that is required is that the unconstitutional act be that of a final policymaker. *Praprotnik,* (Brennan, J., concurring), 99 L.Ed.2d at 128 n.3. But the plurality rejected that view, holding instead that "the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the city's business." *Praprotnik,* 99 L.Ed.2d at 118 (emphasis in original). The plurality did not construe *Owen* as holding that a city could be held liable for the isolated act of the City's policymaker, as petitioner construes *Owen;* rather, the plurality construed *Owen* as evidencing an assumption that a policy could be inferred from such a decision. *Praprotnik,* 99 L.Ed.2d at 117. Policy remained the *sine qua non* of municipal liability.

The holding of the *Praprotnik* plurality is consistent with the statement by the *Pembaur* plurality that liability may be imposed only where there has been "a deliberate choice to follow a *course of action . . .*," *Pembaur,* 89 L.Ed.2d at 483 (emphasis added), and the *Praprotnik* plurality opinion was adopted by a majority of the Court in *Jett. Jett,* 105 L.Ed.2d at 627-628. It is the law, then, that it is a municipal policy, not an act by a municipal policymaker, that stands as a prerequisite to the imposition of municipal liability pursuant to §1983.

The court below faithfully applied these holdings to an unusual situation. Typically, where a final policymaker acts in his area of final policymaking authority, the policymaker's act will be taken pursuant to a policy that the policymaker has made, even if the policy was made contemporaneously with the policy's execution. That is why the Court has assumed that an inference may be drawn from a policymaker's act that there was

a policy. But the peculiar status of the civil service commission makes impossible the drawing of such an inference in the circumstances of this case.

In *Kirby v. Nolte,* 164 S.W.2d 1 (Mo. banc 1942), the Supreme Court of Missouri described the duties of the civil service commission as "mainly quasi-legislative or judicial." *Id.*, 164 S.W.2d at 9. See also Appendix, A-13. This description is accurate: as a quasi-legislative body the commission establishes rules; as a quasi-judicial body the commission determines whether or not the rules have been broken. The commission's decision to suspend petitioner was made in the commisison's quasi-judicial capacity: after a hearing, on the record, at which petitioner was represented by counsel, cross-examined witnesses, and testified, the commission rendered findings of fact, conclusions of law, and a decision, albeit mistaken, that plaintiff had violated a civil service rule and a city charter provision that the rule replicated.

That the City's charter places the rule-making authority in the same officials with whom it places the hearing function is purely adventitious: the two functions could as easily have been placed with separate officials or commissions. If the functions had been separated, no one would contend that an adjudication by the hearing tribunal of whether or not there was a violation of a rule promulgated by the rule-making body is a policy any more than anyone would contend that a municipal court's adjudication of innocence or guilt on an ordinance violation is a city policy. If it were, each time a court makes a determination as to whether or not a statute promulgated by a legislature has been violated, the court would be making policy. This would be a completely unreasonable result. When a judicial body makes an adjudication, it determines whether a particular act has run afoul of a course of action chosen by the legislature; when the civil service commission made its adjudication here, it determined whether petitioner had run afoul of a course of action chosen by the people of the City of St. Louis when they added the civil

service article, with its limitations on political activity, to the city's charter. The commission, by determining that petitioner had violated those limitations, was not making city policy. The commission did not answer the question that is the essence of policy: what ought the city do? Rather, the commission answered the question that is the essence of adjudication: what did petitioner do? That is why the court below was able, the first time it had the case, to reverse the commission's decision to suspend petitioner, finding that the commission had erred in finding that petitioner had violated the city's policy. *Blackwell v. City of St. Louis,* 726 S.W.2d 760 (Mo. App. 1987).

The court below faithfully and correctly applied this court's precedents.

2. **The Petition Does Not Show That There Is A Conflict Between The Decision Below And Decisions Of Any Federal Court Of Appeals.**

In part I(B) of his argument petitioner cites a number of cases from the federal courts of appeals where a court held that a city could be held liable for a decision by a city's final policymaker. However, the court below did not deny that a city could be held liable for a decision made by a policymaker; the court did no more than insist that a liability-engendering decision must have the quality of a policy rather than the quality of an adjudication. If any of the decisions petitioner cites holds otherwise, petitioner has failed to show that this is so.

3. **The Petition Does Not Show That The Decision Below Is Inconsistent With That Of Any Other State Court Of Last Resort.**

Petitioner contends that the decision below conflicts with an appellate court decision in Minnesota and with one in Texas. Not only does petitioner fail to demonstrate wherein there is such a conflict, petitioner fails to demonstrate that either appellate court is a court of last resort.

4. **The Petition Does Not Demonstrate The Need For Additional Guidance From This Court.**

In part II of his petition, petitioner contends that there is a need for additional guidance from this Court. This reason for granting review does not correlate with anything in Supreme Court Rule 17, unless petitioner is obliquely referring to the consideration given a petition which concerns an important question of law which has not been, but should be, settled by this Court. See Sup. Ct. R. 17.1.(c). In any case, other than petitioner's *ipse dixit* that the state of the law in this area is confused and infected with widely varying judicial resolution, there is no demonstration that there is such confusion. Indeed, it was just this past year that a majority of the Court endorsed a mode of analysis for municipal liability cases. See *Jett,* op. cit. There has not yet been sufficient time to judge whether petitioner is correct in his forecast that the decision will cause confusion. Certainly, there is no presumption that it will, and the Court ought not presume that it will.

5. **The Petition Does Not Demonstrate That The Purportedly Novel And Unprecedented Approach Of The Missouri Court Of Appeals Is A Special And Important Reason Why The Writ Should Be Granted.**

In part 3 of petitioner's argument, petitioner contends that the Court should grant the petition because of the novel and unprecedented approach taken below. If by novel and unprecedented, the petitioner refers to the court of appeals' recognition that a policy is required as a precondition of liability even where the actor is a policymaker, he is wrong. See *Morgan v. Tice,* 862 F.2d 1495 (11th Cir. 1989) (not enough that official be a final policymaker; must be a policy). If by novel and unprecedented petitioner refers to the court of appeals' recognition of the civil service commission's dual role and the court's consideration of the quality of the particular decision, he may be right. But if he is right, he is right because it is an unusual

situation. And there is nothing in Rule 17 that suggests that the Court should grant review to consider novel solutions to unusual problems. To the contrary, unusual situations, not likely to be repeated, hardly are the kind that this Court's resources ought to be expended upon.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES J. WILSON
City Counselor
JULIAN L. BUSH*
KATHLEEN A. GORMLEY
Associate City Counselors
Room 314, City Hall
St. Louis, MO 63103
(314) 622-3361

Attorneys for Respondents

*Counsel of Record